STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

SoBow Square, LLC

v.

City of Portsmouth

Docket No. _____

COMPLAINT

NOW COMES SoBow Square, LLC, the Petitioner (hereinafter the "Developer"), by and through its attorneys, DLA Piper LLP (US) and Donahue, Tucker & Ciandella, PLLC, and complains against the City of Portsmouth (sometimes hereinafter the "City", the "City Council" or the "Council"), and in support thereof states as follows.

Introduction

This is the second lawsuit the Developer has been forced to file because of the City's bad faith breaches of its agreements to partner with the Developer to acquire and redevelop the site of the McIntyre Federal Building in downtown Portsmouth (the "Property") through the federal government's Historic Surplus Property Program. The first lawsuit was resolved by a Settlement Agreement dated April 6, 2022, in which the City agreed to work with the Developer to redevelop the Property consistent with a design developed by the City without the Developer's involvement (the "Community Plan"). In exchange for the Developer agreeing to build a project whose revenues would not support its costs, the City agreed to contribute toward construction costs as necessary to insure a rate of return for the Developer. The contractor cost estimates to build the Community Plan (even by the City's own recent numbers) are very high. As a result, the City has now decided that it does not want to live up to the promises it made in the

Settlement Agreement. On purely pretextual grounds, the City has falsely declared an "impasse" in negotiations with the Developer, in an effort to walk away from its contractual obligations without consequence. Having realized that the Community Plan will cost it much more than it wants to pay, the City in bad faith engineered and announced the "impasse" that did not exist, purposely causing the federal government to terminate the City's opportunity to acquire the Property for a dollar. This has doomed the project and breached the City's binding Settlement Agreement with the Developer.

The Developer filed the first lawsuit (Docket No. 218-2020-cv-00352) (the "First Lawsuit") in this Court in March 2020 for breach by the City of the parties' original 2019 development agreement (the "Development Agreement"). The City through the City Council that took office in January 2020 breached the Development Agreement, first by voting upon taking office to reject a ground lease (the "Ground Lease") negotiated by the Developer and the City in accordance with the terms of the Development Agreement, and then, during the pendency of the First Lawsuit, by unilaterally abandoning the original design of the project completely in favor of the new Community Plan design and by purporting in November 2021 to terminate the Development Agreement entirely. A new City Council that took office in January 2022 rescinded the termination of the Development Agreement and then approved the settlement of the lawsuit through the April 6, 2022 Settlement Agreement.

The Settlement Agreement required the Developer and the City to work in good faith to advance the Community Plan. The parties recognized that the Community Plan (as designed by the City and against the Developer's recommendation) increased the costs of development and decreased the project's revenue so that the Plan could not be financially self-supporting. The Settlement Agreement therefore required the City to provide the "public financial support" that

would be "necessary to develop and construct the Community Plan." The Settlement Agreement called for the parties to file an application to the federal government for approval of the project; the application deadline was December 31, 2022. Working throughout 2022, the parties by November 2022 were in a position to meet that deadline, but the City balked at the size of the projected financial contribution it would be required to make and sought and obtained an extension of the deadline.

In January 2023, the City hired consultants to evaluate the cost estimates and pro forma and attempted design changes, all in an effort to reduce the expected financial contribution. But by February 2023, it was clear that despite these efforts, the City's required public financial support would still be at least $46 million, a level the City indicated it did not want to pay. It was then that the City embarked on a transparent effort to get out of the Settlement Agreement, by manufacturing a supposed impasse in negotiations of amendments to the Development Agreement and revisions to the Ground Lease to conform to the Settlement Agreement. The City took unreasonable, objectively bad faith negotiating positions on issues it had sat on for months, peremptorily issued serial ultimata, and demanded immediate compliance. When the Developer in good faith sought a middle ground, the City falsely declared and informed the federal government that the parties were at an impasse and were unable to proceed with the project application. This bad faith campaign had the City's desired effect in early April 2023 of causing the federal government to withdraw its support for the City's acquisition of the Property through the Historic Surplus Property Program, killing the project.

The City's bad faith campaign to avoid its contract obligations breached the Settlement Agreement and constituted willful and knowing unfair and deceptive acts and practices in violation of RSA Chapter 358-A. The Developer brings this action asserting claims for breach

contract and RSA Chapter 358-A violations. The Developer seeks its actual damages, including lost profits and reliance and reputational damages, as well as multiple damages and attorney's fees.

Parties and Jurisdiction

1. SoBow Square, LLC is a Delaware limited liability company with a principal office address of 210 Commerce Way, Suite 300, Portsmouth, Rockingham County, New Hampshire, 03801.

2. The City of Portsmouth is a political subdivision of the State of New Hampshire, is located within Rockingham County, and has a principal mailing address of 1 Junkins Avenue, Portsmouth, Rockingham County, NH 03801.

3. The New Hampshire Superior Court has subject matter jurisdiction over this law suit pursuant to RSA 491:7. Venue properly lies with the Rockingham County Superior Court.

Facts

The Property, Project and Development Agreement

4. The Property is located at 80 Daniel Street in Portsmouth, New Hampshire, is the site of the McIntyre Federal Building, and is currently owned by the United States of America.

5. In 2017, the City of Portsmouth was invited by the federal government to submit an "Application for Obtaining Real Property for Historic Monument Purposes" (the "Application") to the National Park Service (the "NPS") to acquire the Property pursuant to the federal Historic Surplus Property Program. Under the Historic Surplus Property Program, the Property would be conveyed to the City for a dollar, but with a deed restriction or preservation covenant requiring that the Property be preserved and used as a Historic Monument.

6. In August of 2017, the City issued a Request for Proposals ("2017 RFP") seeking a private real estate developer to enter into a public private partnership with the City whereby the City would acquire the Property utilizing the process described above, and then lease the Property to a private developer pursuant to a long-term ground lease. The RFP was widely publicized and attracted some of the best development teams from in and around the Boston area.

7. In November of 2017, in response to the 2017 RFP, several of those real estate developers, including the Developer, submitted proposals to ground lease and redevelop the Property. In its response to the RFP, and after considerable investment of financial resources and time, the Developer proposed to redevelop the Property as a mixed-use project with office, retail, and residential uses and related parking, amenities, infrastructure and public spaces (the "McIntyre Project" or the "Project").

8. On January 16, 2018, after significant public comment and input, the City Council voted to select the Developer as its development partner and authorized the City Staff to negotiate and enter into a nonbinding memorandum of agreement with the Developer that would allow time for additional public input and comment on the McIntyre Project, allow the Developer time to conduct additional due diligence, and allow the City and the Developer time to work together on the Application and negotiate the terms of the Development Agreement and Ground Lease.

9. Between January 2018 and August of 2019, the Developer expended significant time and money to design the McIntyre Project, and the Developer and the City worked together to negotiate the terms of the Development Agreement, negotiate the terms of a proposed Ground Lease, and assemble the Application for submittal to the NPS. Additionally, public hearings and work sessions were conducted before the City Council regarding the McIntyre Project,

significant public comment and input was entertained, and the Project was reviewed by the City's Planning Board pursuant to a preliminary conceptual consultation.

10. On August 12, 2019, the City Council voted to enter into the Development Agreement with the Developer, which was executed and made as of August 29, 2019. The City Council thereby approved the key terms of the Ground Lease, which were contained in Exhibit E to the Development Agreement. The Development Agreement bound the City to proceed with the McIntyre Project and required, specifically with respect to the Ground Lease to be executed, that the City cooperate with the Developer and act reasonably and in good faith to achieve the purposes of the Development Agreement.

11. On the same day, August 12, 2019, the City Council voted to approve the Application for submission to the NPS, which included the essentially complete 91-page form of proposed Ground Lease. The Ground Lease was the product of substantial negotiation between the Developer and the City over the course of several months and reflected agreement on all material terms.

12. The City submitted the Application, with the 91-page form of Ground Lease, to the NPS on August 30, 2019. The NPS responded to the Application with requested changes, all of which were correctible. The Developer, working with the City's financial consultant, revised the Application in response to the NPS's comments and provided the revised Application to the City in December 2019. Also in December 2019, attorneys for the parties fully negotiated the final details of the Ground Lease for inclusion with the revised Application.

13. The Development Agreement in Section 2.1.6 at that point required the City to work with the Developer to submit the revised Application to the NPS ("If the Application is initially rejected by the Park Service for technical reasons or correctible issues then the City agrees that it

will work with the Developer to submit a corrected application."). Once the revised Application with Ground Lease had been approved by NPS, that final form of Ground Lease before it was executed would have to have been approved by the City Council, acting reasonably, in good faith, and consistently with its prior approvals to achieve the purposes of the Development Agreement, namely bringing the agreed-upon McIntyre Project to fruition.

A New City Council Breaches the Development Agreement in 2020

14. Meanwhile, however, in November of 2019, five incumbent City Councilors were voted out of office and were replaced by five new City Councilors, including the new Mayor Rick Becksted (the "Becksted Five"), all of whom campaigned in opposition to the McIntyre Project and were aligned with "Revisit McIntyre", a group organized in opposition to the McIntyre Project. After the Developer was selected as the City's partner and the conceptual design plans were made public, Revisit McIntyre advocated that the City terminate its relationship with the Developer, go back to the drawing board, and redesign the project.

15. Once the new City Council took office in January 2020, the new City Councilors acted quickly to fulfill their campaign promises. On January 28, 2020, the City Council voted to reject the project's Ground Lease without any discussion of its actual terms, while twice ignoring the recommendations of the City Attorney and City Manager to go into non-public session to consider the advice of the City Attorney, as well as ignoring the plain warnings of the Assistant Mayor and several councilors that the City Council's action would amount to bad faith. The ill-timed, ill-considered and uninformed rejection of the Ground Lease was a material breach of the Development Agreement, including the City's obligation to cooperate with the Developer and to act reasonably and in good faith to achieve the purposes of the Development Agreement.

The Developer Files the First Lawsuit and the City's Further Breaches

16. The Developer filed the First Lawsuit against the City on March 11, 2020, for breach of contract based on the termination of the Ground Lease, seeking an award of damages. Almost immediately, however, the Developer entered into an Interim Agreement to Stay Pending Lawsuit with the City, agreeing to stay the First Lawsuit so that the parties could engage "in good faith negotiations to try to achieve resolution on revisions [to the McIntyre Project] acceptable to both sides," without prejudice to their lawsuit positions. A stay entered on April 22, 2020, subject to the case being placed back upon the docket by either party.

17. The City and the Developer first agreed that to avoid penalizing the Developer for the City Council's desire to change the Project, the changes would result in the same economic return for the Developer. The City and the Developer then discussed possible changes including removing one of two buildings from the Project's design. The Developer agreed to the City's desire to conduct a public process, not involving the Developer, to explore how to design the site's open space (the existing open area plus the new open area created by removing one building).

18. That process, however, produced not changes to the McIntyre Project design, as required by the Interim Agreement, but a set of completely new and different designs for the McIntyre site. Over the Developer's written objection, the City Council led by the Becksted Five then adopted one of these entirely new designs as the City's new "preferred design concept" for the McIntyre site. This new design became known as the "Community Plan." The City's abandonment of the McIntyre Project design in favor of the new, entirely different Community Plan breached not only the Interim Agreement but the Development Agreement, which

committed the City to the original McIntyre Project design as modified only by changes required by the NPS and by other federal, state, and local permitting and regulatory processes.

19. Despite the City's breaches, the Developer thereafter discussed settlement terms with the City on which it would amend the Development Agreement, modify the Ground Lease, and build the City's new "Community Plan" design for the McIntyre site, assuming approval by the NPS. During those discussions, the City stressed that it was time to resolve the lawsuit – in advance of the upcoming November 2, 2021 City Council election – and move forward with the Community Plan. Taking the City's statements at face value, the Developer in September prepared and presented to the City a Project Restart Agreement containing terms that the City had indicated were acceptable, including the same economic return for the Developer as the McIntyre Project. Yet the City then informed the Developer that the City would have no response to the Project Restart Agreement until *after* the election. (In fact, the City never responded.)

20. In the face of this erratic behavior, the Developer in October moved in court to terminate the stay and return the case to the active docket. The court granted that motion on October 26, 2021.

21. In the City Council election that occurred on November 2, 2021, seven of the nine councilors, including all of the Becksted Five, were defeated. Before they left office in January 2022, however, in a lame duck session on November 18, 2021, they voted to terminate the Development Agreement with the Developer and to issue a new request for proposal ("RFP") for the McIntyre project to be put out to bid as soon as possible, which they did in fact put out to bid in December 2022.

22. The City did so, without legal excuse, in bad faith, purposeful breach of the contract, after:

a. orchestrating a vote in secret and failing to give advance notice of their intended action;

b. making clear that their motive was to punish the Developer and Michael Kane for engaging in election, petitioning and free speech activities protected by the New Hampshire and United States Constitutions in connection with the November 2, 2021 City Council election in which all five were defeated;

c. defying the advice of the City's legal and financial professionals (i) that they obtain legal advice of the City's outside legal counsel, who was present and available to advise them, and (ii) that terminating the Development Agreement was not in the City's best interests and would expose the City to increased liability and legal expense not budgeted for; and

d. ignoring the pleas of their fellow City Councilors, newly elected incoming City Councilors, a former City Councilor, and an incoming School Board member that they properly notice the vote, obtain public input and legal advice, and not abuse their power and ethical obligations.

The Developer and City through a New City Council Settle the First Lawsuit

23. The new City Council took office in January 2022. On February 10, 2022, the new City Council voted unanimously to rescind all actions taken by the lame duck City Council at its meeting on November 18, 2021, including but not limited to the vote to terminate the Development Agreement and to authorize the RFP.

24. Thereafter, at the direction of the new City Council, the City negotiated a settlement of the lawsuit with the Developer. The first settlement term sheet was exchanged on February 23, 2022. Negotiations continued for the next six weeks, culminating in a Settlement Agreement made as of April 6, 2022, which was approved by the City Council that same day.

The Material Terms of the April 6, 2022 Settlement Agreement

25. The material terms of the Settlement Agreement included the following:

a. Section 1, "Settlement Contingent on Approval by General Services Administration ('GSA')," made the settlement contingent on the GSA granting the City a minimum six-month extension of time to file its application under the

Historic Surplus Property Program with the NPS for the McIntyre property. The GSA ultimately did extend the date for the City to file its NPS application until D/ecember 31, 2022.

b. Section 2, "Dismissal of Lawsuit," required the Developer to dismiss its claims against the City in the First Lawsuit with prejudice. The Developer did so.

c. Section 3, "Advancement of the Community Plan," required the City and the Developer to "work together cooperatively, each acting reasonably and in good faith, to advance the development of the Project consistent with the Community Plan," including acting reasonably "in addressing further development and any changes to the Community Plan necessary to address engineering, design, and marketability concerns." During the Settlement Agreement negotiations, the City repeatedly stressed that the City Council was determined to build the Community Plan despite the Developer's warnings about its feasibility. That was confirmed by the April 6, 2022 City Council meeting at which the City Council voted to approve the Settlement Agreement over public comment objections that the Council was committing the City to build the Community Plan without knowing what it would cost.

d. Section 4, "Expenses," required the City to reimburse the Developer $2 million for prior Project-related expenses that have been rendered unusable due to the changeover to the Community Plan." The $2 million was a negotiated number that represented only a portion of such unusable expenses that the Developer had incurred.

e. Section 5, "City Contributions to the Costs of Project Development and Construction," required the City to support the Project financially and guaranteed a reasonable rate of return to the Developer that was comparable to that projected on the original project. The Developer insisted on this provision because it was apparent to the Developer that it would be impossible for the Community Plan to be profitable. Section 5 stated:

> The Parties acknowledge that public financial support from the City will be necessary to develop and construct the Community Plan. The Parties shall agree upon an updated financial pro forma for the construction of the revised project, each acting reasonably and in good faith. The updated pro forma will project a Rate of Return on Developer's invested capital of an unlevered return on Developer invested capital of 7.4%. …

Section 5 further required the City (but not the Developer) to enter into such arrangements as necessary to project and protect the Developer's Rate of Return:

> The City shall enter into such further agreements as necessary to (a) make financial contributions to the cost of development and construction of the Project (through infrastructure commitments and/or monetary payments the nature and timing of which shall be negotiated in good faith by the parties) in amounts necessary to project the Rate of Return or (b) agree to changes to the Community Plan to reduce the Project's development and construction cost or to increase the Project's projected net income as necessary to project the Rate of Return.

f. Section 5 concluded by providing that "The City shall have no obligation to subsidize or contribute to costs of operating the Project incurred after completion thereof." The City wanted no part of market risk, leasing risk, or operating expense risk.

g. Section 6, "Amendments to Development Agreement; Approval of Ground Lease," provided that the parties acting reasonably and in good faith would "negotiate and implement amendments to the Development Agreement necessary or appropriate to reflect the changes contemplated by this Agreement, including

the construction of the Community Plan" and revisions to the Ground Lease "necessary or appropriate to reflect the changes contemplated by this Agreement.…"

h. Section 9, "Cooperation," required the parties "to cooperate with each other, and to act reasonably and in good faith, in order to achieve the purposes of this Agreement …"

The Parties' Efforts to Develop the Community Plan in 2022

26. The parties began working on the Community Plan in June of 2022, after GSA approval of an NPS application extension until December 31, 2022. The Developer made several suggestions to modify the plan to increase its economic feasibility and reduce the necessary public financial support (such as expanding the width of the two new buildings to 65 feet to accommodate the optimal density for apartments/housing). The City rejected many of the Developer's suggestions and settled on an only slightly modified design of the Community Plan.

27. On September 13, 2022, the City asked the Developer to obtain cost estimates for the construction of that design. The Developer then set a hard date of October 14, 2022 for the architect and planner group to complete a 50% schematic design drawing package that could be sent out to contractors for cost estimating.

28. On September 28, 2022, the Developer provided to the City for review and approval an Amended and Restated Development Agreement with amendments necessary and appropriate to reflect changes contemplated by the Settlement Agreement, as required under Section 6 of the Settlement Agreement. As explained below, the City did not respond until over four months later.

29. During the production of the 50% design package, the Developer solicited contractors to bid on the project. Given the well documented controversy over this Project it was difficult to engage qualified contractors, and a number of the contractors the Developer contacted either declined to bid on the project or simply did not respond, including Callahan Construction, Dellbrook, Cord/erman and Company, and Shawmut. However, the Developer was finally able to secure four qualified contractors to bid on the project – StructureTone, Consigli, Landry-French, and Garland Boston.

30. Design documents were completed on schedule on October 14, 2022 and were sent to the contractors on October 15. All contractors who had proposed to bid had been given advance notice that they would receive the documents on this date. The Developer asked for bids to be returned by no later than November 7, 2022.

31. To provide the contractors with as much information as possible for use in cost estimating, the Developer set up tours to walk each contractor through the McIntyre building and to walk the larger site. After the walk throughs, the Landry-French group on October 26 declined to move forward with cost estimating for the Project.

32. The Developer received the StructureTone bid on November 7, the Consigli bid on November 8, and the Garland Boston bid on November 9. The bids received were for $146 million, $94 million and $74 million respectively. The Developer advised the City that Garland Boston's $74 million bid should be ignored because a number of its critical subcontractors declined to bid and the bid was incomplete and unreliable.

33. In November 2022, based on the StructureTone and Consigli bids, the Developer prepared a pro forma averaging their cost estimates and estimating a $120 million dollar cost. As reflected in this pro forma, the projected stabilized net operating income for the project, with

the 7.4% Rate of Return to the Developer required by the Settlement Agreement, would support only a $40 million project. As such, if the actual/final construction costs stayed at $120 million, the City would have to provide public financial support for the Project under the Settlement Agreement in the amount of $80 million. Russell Preston from the City's urban design, development and planning firm, the Principle Group, acknowledged that the cost estimates were not a surprise and that the stabilized net operating income figure was consistent with what he expected.

34. City Staff responded that the City did not want to pay and would not authorize paying $80 million of public financial support. Yet, the City would not answer what amount the City would contribute. The City Staff intimated little City Council support for a sizable financial contribution.

35. The City then unilaterally decided to request from the GSA an extension of the date to file an NPS application beyond December 31, 2022, ostensibly to have time to review the pro forma and clearly in hopes of finding a way to reduce the projected financial contribution. The Developer told the City that an extension was unnecessary because there was no impediment to completing and filing the Application by December 2022, as the Settlement Agreement contemplated and as the parties had been hard at work to accomplish. The Developer nonetheless said it would cooperate by supporting the City's request.

36. The City asked for the 90-day extension from December 31, 2022 to March 31, 2023 during a Zoom meeting with the GSA on November 22, 2022. The GSA gave tacit approval of a 90-day extension conditioned on the NPS expressing support for the current design of the Community Plan and indicating that it was a plan that the NPS could approve.

37. On December 16, 2022, the Developer, the City and the Principle Group had a Zoom meeting with the NPS. During this call the NPS indicated that they supported the current Community Plan and saw "no red flags." Also during this call, City staff informed the NPS that they thought the estimated costs of the Community Plan were excessive, that the City would have to value engineer the Community Plan, and that it was very likely that the time to complete that value engineering would extend well beyond the 90-day extension that the City was requesting from the GSA. The NPS indicated that they were under no time constraints and that the only issues with timing were coming from the GSA.

38. Later that same day (December 16, 2022) the Developer and the City had a meeting with the GSA during which the City reported to the GSA that the NPS had supported the then current Community Plan design and saw no red flags. Based on that account of the conversation with the NPS, the GSA confirmed the 90-day extension of to file the NPS application from December 31, 2022 to March 31, 2022.

The City's Efforts to Reduce Its Projected Financial Contribution

39. In January and February 2023, in an effort to reduce the City's financial obligations to the Project, the City undertook a reevaluation and redesign of the Project, resulting in further delay and increased cost for the Developer. By mid-February 2023, the City staff and consultants had settled on a new design concept for the Project. The completion of the re-design would require substantial additional time and expense extending past March 31, 2023.

40. In January 2023, the City also hired consultants to review the Project's estimated costs and the preliminary pro forma prepared by the Developer.

41. On January 30, 2023, the City provided comments to the proposed Amended and Restated Development Agreement that the Developer had provided *over four months earlier*.

Contrary to the City's Settlement Agreement obligations, the City for the first time put forward the position that the City retained various rights to terminate the Development Agreement and walk away from the Project without any recourse for the Developer. At no point from September 28, 2022 to January 30, 2023, while the Developer continued to work in good faith with the City and expended thousands of dollars to advance the Community Plan and then explore design changes desired by the City, had the City disclosed to the Developer that it would insist on these termination rights.

42. The City similarly sandbagged the Developer by delaying comments on an updated Ground Lease. The Developer provided an updated draft of the Ground Lease to the City on November 10, 2022. The City withheld its comments to that draft for almost four months also, as further explained below.

43. By late February 2023, the City's consultants essentially confirmed the approximately one hundred-million-dollar cost estimates for the Project, and, even with overly optimistic revenue projections that were neither realistic nor attainable, projected that the City's financial contribution to the Project would be at least $46 million. Given the City staff's earlier refusal to answer what the City would be willing to pay, the Developer asked the City to confirm that it intended to honor its obligation under the Settlement Agreement to make a financial contribution if this were the amount required. The City avoided answering the question, citing the "municipal budget process."

The City's Bad Faith Campaign to Avoid its Contractual Obligations

44. At this point, having come face to face with the hard reality – verified by its own consultants – that moving forward would require a City financial contribution in the many tens of millions of dollars, events establish that the City made a strategic intentional decision to

undermine the Developer and try to extricate itself from the Settlement Agreement without financial consequence.

45. The City began demanding in a series of ultimata that the Developer agree to negotiating positions that had no good faith basis. The City demanded that the Developer immediately agree that the City (a) retained all termination rights under the Development Agreement and (b) was entitled to "enhanced" Project revenue sharing under the Ground Lease because of the City's obligation to contribute to the costs of the Project under the Settlement Agreement. The City threatened that the Developer would be in breach of the Settlement Agreement if it did not immediately cave in to the City's demands.

46. There was no good faith basis for either position. As to termination rights, the Settlement Agreement in Sections 3 and 9 unambiguously required the Developer and the City to construct the Community Plan – it was not a contingent option to build that either party could walk away from. Pursuant to Section 5, the City was definitively obligated to make the financial contributions to the cost of development and construction of the Project necessary to project the Rate of Return. The Settlement Agreement provided no cap on this obligation and no discretionary right for the City to walk away if, on further thought, it wished not to honor this obligation.

47. Developer relied on these binding provisions when it dismissed its damages claims in its First Lawsuit, conceded only a partial reimbursement of its expenses lost in the original project, and agreed to spend hundreds of thousands of additional dollars pursuing the development of the Community Plan. The Settlement Agreement did not require the Developer irrevocably to agree to these various concessions and obligations, while permitting the City to exercise discretionary

rights to terminate and walk away from its obligations if the Project did not turn out as it had hoped.

48. As to revenue sharing, the updated Ground Lease circulated by Developer retained all the revenue sharing provisions of the original, which Developer recognized and continued to support. These included the Developer's agreement to pay percentage rent, to share refinancing proceeds, and to share sale proceeds. Most notably, the Ground Lease called for sharing Excess Income, which limited the Developer to retaining only a "reasonable profit." Under the agreed form of Ground Lease that the Developer continued to honor, if the Project turned out to be sufficiently successful that its profit was more than a reasonable amount, then the Developer agreed that *all* of such additional profit would be paid to the City. The City first revealed to the Developer its position that the existing revenue sharing provisions should be enhanced when it delivered its comments on the draft Ground Lease on March 7, 2023, nearly four months after receiving the proposed updated Ground Lease from the Developer.

49. However, the City's obligation to make financial contributions was not a basis for the City to claim the right to *enhanced* revenue sharing, as it asserted. The financial contributions would be necessary just to make the Community Plan feasible and financeable. The Settlement Agreement did not provide or in any way contemplate that the Developer would be relinquishing its basic economic rights in exchange for the City's financial contribution. To the contrary, the Settlement Agreement expressly provided that the City would have no obligation to subsidize or contribute to the costs of operating the Project incurred after its completion, leaving all of the market risk, leasing risk, and operating expense risk to the Developer. The Developer alone would have the exposure to this economic downside and therefore was also entitled to any

potential upside, which was already limited by the existing revenue sharing provisions, including limiting the Developer to a reasonable profit and with any excess profits to be paid to the City.

50. When the Developer did not immediately capitulate to the City's termination and enhanced revenue sharing positions, the City moved quickly to try to engineer its exit from the Settlement Agreement. The City began by surprising the Developer with an announcement to the GSA at a check in meeting on February 28, 2023 that there were "major problems" with the Development Agreement that the parties might not overcome and that an unspecified "impasse" might prevent the parties from filing an application with the NPS by the March 31, 2023 deadline.

51. This announcement was false. The City had said nothing to the Developer about an impasse. The legal negotiation of the amended Development Agreement was just getting underway following the City's four-month delayed response to the Developer's initial draft. There had been subsequent discussions between the parties' counsel acknowledging there was middle ground. Furthermore, the City had not yet even responded to the Developer's updated draft of the Ground Lease or informed the Developer that it would be demanding enhanced revenue sharing.

52. The City staff, nonetheless, over the Developer's objections, continued in their false portrayal of an "impasse," informing the City Council of the supposed impasse in negotiations at a meeting on March 11, 2023, prompting a vote by the City Council – who throughout the process refused to meet directly with the Developer, despite its repeated request – declaring that the Developer and the City had reached an "impasse" in negotiating the Development Agreement and Ground Lease. The declaration of impasse occurred a mere four days after the City provided its response to the updated Ground Lease, failing to give the Developer an opportunity to begin

any meaningful negotiation of it before declaring an impasse over its terms. The City then informed the GSA of this vote and supposed impasse at a meeting on March 13, 2023.

53. Nonetheless, the Developer continued to negotiate in good faith with the City. The Developer made multiple concessions as to termination rights that it was not required to make to try to advance the Project. Ultimately, the Developer agreed for the sake of compromise to all of the specific termination rights upon which the City was insisting, while reserving the position that the City was not entitled to terminate based on an unwillingness to make the financial contribution required by the pro forma or if for any reason it no longer wanted to proceed to advance the Community Plan.

54. As to enhanced revenue sharing, while reiterating that the Settlement Agreement did not entitle the City to it, the Developer requested the City to make any proposal consistent with the Settlement Agreement and draft Ground Lease. The City never did so, in fact never actually proposing for the Developer's consideration what form of enhanced revenue sharing the City desired. Instead, it doubled down on its bad faith positions, by presenting a revised pro forma that showed the Developer receiving less than the 7.4% Rate of Return specified and required by the Settlement Agreement.

55. Throughout March 2023, the City clung to its false mantra of "impasse," refusing to proceed with the NPS application, intentionally causing the parties to miss the GSA's March 31, 2023 deadline, and refusing to request an extension. The City falsely and in bad faith again informed the GSA on March 31, 2023 that the parties were and remained at an impasse.

56. In truth, the parties were not at a good faith impasse. The Developer had agreed to the City's position on termination rights, and the City's insistence on unspecified enhanced revenue sharing had no good faith basis but was a breach of the Settlement Agreement.

57. The City's false declarations to the GSA had the effect the City was transparently seeking. The City's bad faith insistence on an impasse caused the GSA to terminate the opportunity for the City to submit an application to the NPS to acquire the Project site through the Historic Surplus Property program and to withdraw its support for the application.

58. As a direct and proximate result, the Developer has lost the opportunity to develop the Project and the reasonable profit it would have earned from the Project. The Developer has also lost the hundreds of thousands of dollars it has expended since the Settlement Agreement was executed in April 2022 advancing the development of the Community Plan and the amounts invested in the project that were not reimbursed by the Settlement Agreement.

59. If the City had been operating in good faith, as it was required to do, the parties would have easily reached agreement on the terms of the Development Agreement and Ground Lease. Instead, on purely pretextual grounds the City declared an impasse, so as to claim the right to walk away from the Project without financial consequence. The City's true motivation was that it decided it had made a deal it did not want to honor and chose to breach the Settlement Agreement rather than proceed with the Project because it knew the costs of paying the Developer damages would be less than the cost of performing the contract. The City's representatives also cynically hoped that its bad faith attempts to create an impasse would convince the public and this Court that it was not at fault, even though it deliberately chose to create the impasse once it realized how much it would truly cost to build the Community Plan.

Claims for Relief

Count I: Breach of Contract

60. The Developer repeats and incorporates by reference the allegations in paragraphs 1 through 59 above.

61. The Settlement Agreement is a binding and enforceable contract between the City and the Developer.

62. The Developer has performed all of its obligations under the Settlement Agreement when due.

63. The City has failed without legal excuse to perform its material obligations under the Settlement Agreement. The City materially breached the Settlement Agreement by its actions described above, including by failing to act reasonably and in good faith to advance the development of the Project consistent with the Community Plan, by failing reasonably and in good faith to negotiate and implement amendments to the Development Agreement and revisions to the Ground Lease, and by failing to cooperate with the Developer, acting reasonably and in good faith, to achieve the purposes of the Settlement Agreement.

64. Instead, the City intentionally caused the parties to miss the GSA's March 31, 2023, application deadline and declined to request an extension. The City falsely and in bad faith declared and informed the GSA that the parties were and remained at an impasse in negotiations, causing the GSA to terminate the opportunity for City to submit an application to the National Park Service to acquire the property through the Historic Surplus Property public benefit conveyance program and to withdraw its support for this conveyance option.

65. As a direct and proximate result of the City's breach of the Settlement Agreement, the Developer has suffered damages recoverable under the Agreement.

66. The Developer's damages include lost profits from the Project. There is substantial relevant data showing that reasonable and significant profits were reasonably certain to result to the Developer from the Project in the absence of the City's breach. This substantial data includes not only the Developer's own analyses and projections, but also the financial models of

the City's Project consultants of projected expenses, rent, interest rates, and other financial inputs to project the reasonable returns to the Developer and the City that the Project would produce.

67. The Developer's damages also include the expenses that the Developer has incurred in pursuing the development of the Project, including out of pocket costs and the dollar value of its time and effort, and the damage to the Developer's reputation resulting from the City's breach.

68. Accordingly, the Developer is entitled to recover its damages, including actual, incidental, and consequential damages, plus attorney's fees, costs and expenses, all within the jurisdictional limits of this Court.

Count II: Violations of RSA 358-A

69. The Developer repeats and incorporates by reference the allegations in paragraphs 1 through 68 above.

70. The City's development activities in connection with the McIntyre Property including with the Developer under the Settlement Agreement constitute the conduct of trade or commerce within the State of New Hampshire.

71. By its actions as alleged above, including its false, pretextual and bad faith declaration of "impasse," to try to extricate itself from its obligations to proceed with the Community Plan, the City engaged in unfair or deceptive acts or practices in New Hampshire in violation of RSA 358-A.

72. These violations of RS 358-A were willful or knowing.

73. As a direct and proximate result of the City's willful or knowing unfair or deceptive acts or practices, the Developer incurred damages.

74. Under RSA 358-A:10, the Developer is entitled to recover its actual damages, plus no more than three but no less than two times such amount.

75. Under RSA 358-A:10, the Developer is also entitled to recover its costs of suit and reasonable attorney's fees, as determined by the Court.

Count III: Attorney's Fees

76. The Developer repeats and incorporates by reference the allegations in paragraphs 1 through 75 above.

77. The general rule in New Hampshire is that each party to litigation must pay its own attorney's fees. See Bedard v. Town of Alexandria, 159 N.H 740, 744 (2010). However, there is an exception to this general rule applicable in this case.

78. A trial court may award attorney's fees upon a finding that a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action." Harkeem v. Adams, 117 N.H. 687, 690-91 (1977) (quotations and citations omitted).

79. As detailed above, the pretextual manner in which the City engineered its underhanded attempt to extricate itself from the Settlement Agreement and its obligations thereunder constitutes a blatant and bad faith breach of the Development Agreement warranting an award of attorney's fees pursuant to Harkeem.

WHEREFORE, the Developer requests that the Court:

A. Upon summary judgment or after trial, enter judgment in the Developer's favor against the City;

B. Under Count I, award damages in an amount to be proven at summary judgment or trial;

C. Under Count II, award as much as three times, but not less than two times, the amount of its damages;

D. Under Count III, award the Developer's reasonable attorney's fees;

E. Award pre-judgment interest and post-judgment interest on all amounts awarded, together with the costs of this action; and

F. Grant such relief as the Court deems proper and just.

Respectfully submitted,

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